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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 28

FRANCESCO FOTI, a/k/a FRANK FOTI, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

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Statement of Interest

A motion is now pending before this Court to authorize the filing of this amicus curiae brief.

The Association of Immigration and Nationality Lawyers is a national organization chartered under the laws of the State of New York. Its members are attorneys specializing in immigration, naturalization and nationality matters. Our interest in supporting the views of the majority of the

Second Circuit in the decision below, 308 F. 2d 779, prompts us to file this brief.

Statutory Provisions Involved

Section 106 of the Immigration and Nationality Act of 1952, as amended [75 Stat. 651, U.S.C. 1105(a), Supp. IV 1958 Ed.], provides:

> "JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION. Section 106(a). The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat 961, 5 U.S.C. 1031, et seq.) shall apply to, and shall be the sole and exclusive procedure for the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242 (b) of this Act or comparable provisions of any prior Act * * *."

Question Presented

Is the original jurisdiction of the Circuit Court of Appeals limited to final orders of deportation under Section 106 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1105(a) or does it encompass any and all types of orders entered in a deportation proceeding including denials of voluntary departure, adjustment of status, stays of deportation, and/or denials of suspension of deportation?

Statement

Petitioner, a native of Italy, remained in the United States longer than permitted as a seaman on December 16, 1950 (R.1-2). On June 9, 1961, he was accorded a deportation hearing pursuant to 8 U.S.C. 1252(b). His deportability was conceded. On September 19, 1961, a special

inquiry officer denied his application for suspension of deportation pursuant to 8 U.S.C. 1254(a)(5) but granted his alternative request for voluntary departure under 8 U.S.C. 1254(e). Provision was made in the order for withdrawal of the privilege of voluntary departure without notice upon failure to depart when required and for deportation according to law. (Govt. Brief, Appendix B, pp. 89-90.)

An appeal from this decision was dismissed by the Board of Immigration Appeals on November 28, 1961 (R. 1-3). On November 29, 1961, a notice was issued for petitioner to depart on or before December 18, 1961. This notice further stated:

> "Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and steps being taken to effect your deportation." (Govt. Brief Appendix B, p. 92)

An additional notice served the same day advised petitioner that he would be deported to Italy if he failed to depart within the authorized time (Govt. Brief, Appendix B, p. 93). No notice was ever served indicating that the privilege of voluntary departure had been withdrawn, nor does any notation to that effect appear in the file.

Judicial review sought in the District Court on December 15, 1961, was denied for lack of jurisdiction (R. 6). Thereafter, this proceeding to review the denial of suspension of deportation was instituted in the Court of Appeals on January 15, 1962 (R. 4-6). By a 5-4 decision, the Court of Appeals dismissed the petition for lack of jurisdiction (R. 7-36, 308 F. 2d 779). The matter is here on certiorari to the Second Circuit.

Summary of Argument

The petitioner has not yet forfeited his right to voluntary departure under the District Director's letter of November 29, 1961. Under the circumstances, there is no effective order of deportation which can be reviewed.

The term "final order of deportation" is a term of art as stated by the Court below. It appears frequently in the Immigration and Nationality Act of 1952 and should have the same meaning throughout. This meaning, well recognized prior to the judicial review statute, does not encompass denials of supension of deportation. It does not include all matters arising in a deportation hearing. Neither the legislative history nor the Committee reports require alterations of the well-recognized meaning ascribed to a "final order of deportation". The decision below, therefore, correctly concluded that it had no original jurisdiction to review an order denying suspension of deportation.

ARGUMENT

I

Historical Background of Statutory Review Provisions of Deportation Orders

In *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), this Court upheld judicial review of a denial of suspension of deportation where no final order of deportation had been rendered. Kristensen had been granted voluntary departure without an order of deportation. The Government, opposing judicial review, had argued unsuccessfully that:

> "The Immigration Act of 1917 provides that the decision of the Attorney General in alien deportation cases shall be 'final'. This has long been held to mean

> that deportation orders are subject only to limited collateral review afforded by habeas corpus proceedings." (Govt. Brief, p. 11)

Thereafter, in *Heikkila* v. *Barber*, 345 U.S. 229 (1953), this Court held that under the 1917 Immigration Act giving finality to administrative orders of deportation Court review was limited to habeas corpus. Under the 1952 Immigration and Nationality Act, however, deportation orders were held to be reviewable in declaratory judgment actions. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1954).

On September 24, 1953, Attorney General Brownell reported to the Judicial Conference of the United States that in view of the conflict between *Heikkila* v. *Barber*, *supra*, and *Rubinstein* v. *Brownell*, 206 F. 2d 449 (prior to its affirmance in 346 U.S. 929), that:

> "we think Congress should spell out a method of obtaining judicial review in the district court for any alien against whom a final order of deportation has issued, whether he is in custody or not."

On February 8, 1956, President Eisenhower called for legislation (H. Doc. 329, 84th Cong., 2nd Sess.) and the draft of a bill was transmitted to Congress by Attorney General Rogers on that day providing for judicial review of deportation orders in the district court. S. 3169 and H.R. 9182 were introduced in the 84th Congress embodying this recommendation. Similar bills, S. 345 and H.R. 507 were introduced in the 85th Congress.

H.R. 12487, 85th Congress, for the first time vested original jurisdiction in the Court of Appeals to review final orders of deportation. This was supplanted by H.R. 13311 which was the subject of hearings on July 10, 1958, before the House Subcommittee on Immigration. The bill was sup-

ported by the Department of Justice and opposed by the American Bar Association, the Association of Immigration and Nationality Lawyers, and others. The bill was favorably reported, H. Rept. 2478, 85th Cong., 2nd Sess. It was reintroduced as H.R. 2807, 86th Cong., and favorably reported again in H. Rept. 423. Judge Biggs, the author of *Lam Man Chi* v. *Bouchard*, 314 F. 2d 664 (C.A. 3, 1963), which follows the decision below, reported H.R. 2807 favorably to the Judicial Conference of the United States in September, 1959, and secured its endorsement. *1959 Annual Report of Proceedings of the Judicial Conference of the United States*, p. 8.

The bill finally emerged in the 87th Congress as S. 2237 (H. Rept. 1086) and became Public Law 87-301.

II

The Deportation Order Herein Is Not Final

Judicial review by the mandate of the statute applies only to final orders of deportation. Petitioner has been directed to leave the United States without an order of deportation. Although the date of voluntary departure has expired (December 18, 1961), there is nothing in the record to show that the privilege of voluntary departure has been withdrawn or forfeited in conformity with the District Director's letter of November 29, 1961 (Govt. Brief, Appendix B, p. 92).

> "Failure to depart within the allotted time may forfeit the privilege." *Gordon and Rosenfield, Immigration Law and Procedure*, p. 710.

Normally, when an order of deportation becomes effective, upon an alien's failure to depart, a warrant of deportation is issued. 8 C.F.R. 243.2. Until the issuance of a warrant

of deportation, the District Director is authorized to extend the period of voluntary departure. In the instant case, it cannot be said that the order of deportation is presently in force and therefore subject to review.

III

The Term "Final Order of Deportation" Is a Term of Art and Does Not Refer to Denials of Suspension of Deportation or Other Rulings in a Deportation Case.

We submit that the Court of Appeals correctly observed that the words "final order of deportation" were a term of art. The 1952 Immigration and Nationality Act repeatedly utilizes these words.

1. Section 242(b), 8 U.S.C. 1252(b), authorizes a special inquiry officer to make "determinations including orders of deportation".

2. Section 242(c), 8 U.S.C. 1252(c), gives the Attorney General authority to detain an alien for six months after a "final order of deportation".

3. Section 242(d), 8 U.S.C. 1252(d), authorizes supervision of any alien against whom a "final order of deportation" has been outstanding.

4. Section 242(e), 8 U.S.C. 1252(e), provides criminal sanctions for aliens in certain categories who delay their deportation after entry against them of a "final order of deportation".

5. Section 242(f), 8 U.S.C. 1252(f), provides for the reinstatement of the previous "order of deportation" of an alien unlawfully reentering after deportation.

6. Section 244(a)(2), (3), (4), 8 U.S.C. 1254(a)(2), (3), (4) [prior to 1962 amendment by Public Law 87-885], contained three provisions for suspension of deportation for

aliens who have not "been served with a final order of deportation issued pursuant to this Act".

7. Section 405(a), 8 U.S.C. 1101, note, provides for continuing validity of outstanding "orders or warrants of deportation" on the effective date of the Act.

In addition to the foregoing, the regulations of the Immigration Service contain provisions relating to final orders of deportation, 8 C.F.R. 243 (1963 Supp.).

A final order of deportation is one which has achieved administrative finality, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 52 (1954).

A special inquiry officer may enter an order of deportation or any other order he is authorized to make including the grant or denial of suspension of deportation. 8 U.S.C. 1242(b), 8 C.F.R. 242.18 (1963 Supp.)

The Court below appropriately observed, 308 F. 2d at 781:

> "When Congress, in 1961, gave the Courts of Appeals jurisdiction to review 'final orders of deportation' * * * made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act; it was thus using a term of art which had been used repeatedly in § 242 and possessed a well-understood meaning."

A final order of deportation had a well-defined meaning among officials of the Immigration Service and with immigration practitioners. It was not an order granting or denying suspension of deportation, it was not one relating to voluntary departure, adjustment of status, registry, stay of deportation, denial of a visa petition, or of a waiver.

See *Wasserman, Immigration Law and Practice* (1961), p. 131.

When Congress confined original review jurisdiction in the Court of Appeals to final orders of deportation, it did not include all ancillary orders which may now be entered in a deportation hearing. As Mr. Justice Holmes said in *United States* v. *Atchison T. & S. F. R. Co.*, 220 U.S. 37 (1910):

> "We see no reason to suppose that Congress meant more than it said."

Congress might have vested the Court of Appeals with jurisdiction to review all orders entered in a deportation hearing, including orders of voluntary departure and those disposing of a suspension application. Instead, it restricted review to final orders of deportation in legislation carefully drafted and reviewed by the Department of Justice.

> "* * * where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." *Case* v. *Los Angeles Lumber Products*, 308 U.S. 106, 115 (1939).

It should also be noted that it is fair to assume that the words "final order of deportation", "were employed by the Congress throughout the Act in the same and not different senses." *United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1940).

Finally, we conclude as this Court did in *Barber* v. *Gonzales*, 347 U.S. 637 at 643 (1953):

> "In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning."

Giving the words "final order of deportation" their usual technical meaning requires an affirmation of the majority opinion below.

IV

The Statute Requires Substantial and Probative Evidence to Support Findings of the Attorney General

Section 106(a)(4), 8 U.S.C. 1105(a)(4), Supp. IV, 1958 Ed., requires that:

> "The petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive * * *."

If the suspension denial is an integral and inseparable part of the deportation order, as contended by the respondent, and if it is reviewable initially in the Court of Appeals, then it should be tested by the substantial evidence rule set forth above. However, there is nothing in the legislative history to show that Congress planned to overturn *Jay* v. *Boyd*, 351 U.S. 345 (1955), holding that confidential information could be utilized in denying suspension of deportation. We believe that the Court below correctly decided on this basis that the statute was not drafted to review denials of suspension orders.

V

Neither the Committee Reports Nor the Congressional Debates Require Reversal of the Decision Below

The bill which became law was S. 2237 of the 87th Congress. Reliance is placed by the Government not on Congressional debates relating to this bill but to predecessor bills. Assuming that such debates have some persuasive force, it is said that they clarify the meaning of "final orders of deportation" and change the term to include "all questions which may arise in a deportation proceeding".

The words "final order of deportation" are neither doubtful nor obscure. Explanatory statements of members of Congress in charge cannot be considered under these circumstances as an aid in construction. *Railroad Commission* v. *Chicago B. & Q. R. Co.*, 257 U.S. 563, 589 (1921). Where language is clear, as here, the words employed are to be taken as the final expression of the meaning intended. *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269, 277 (1928).

Moreover, the debates reveal a surprising lack of familiarity with deportation procedures by Congressman Moore (Govt. Brief, pp. 32, 33, note 19), one of the main sponsors of the bill and the author of one of the supporting Committee reports. H. Rept. 423, 86th Cong., 1st Sess.

The last mentioned report, at page 20, contains the chart relied upon so heavily by the Government (Govt. Brief, p. 28). Obviously, the chart had no impact upon Congressman Moore who believed, as the Government acknowledges, that a suspension application was made after entry of a final deportation order. It is obvious, therefore, that this chart did not play a major role in the passage of S. 2237 in a subsequent session of Congress.

We submit that the views of Judge Biggs, who approved and sponsored this legislation in the Judicial Conference are more persuasive. In *Lam Man Chi* v. *Bouchard*, 314 F. 2d 663, 673, 674 (C.A. 3, 1963), he stated:

> "The express language of the statute is such that to interpret as has been suggested requires judicial legislation of such a sweeping and broad kind as to be virtually impossible."

Conclusion

We submit that the decision below was clearly justified in interpreting the judicial review statute to limit original Court of Appeals jurisdiction to final orders of deportation and in not including all matters arising in a deportation proceeding.

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